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In the Supreme Court of the United States

October Term, 1941

BAKERY SALES DRIVERS LOCAL UNION No. 344 (A. F. of L.), AUTO TRUCK DRIVERS JOINT COUNCIL No. 50 (A. F. of L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA and G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, a Corporation,

Respondent.

Brief Opposing the Issuance of a Writ of Certiorari

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THE PRINCIPAL QUESTION PRESENTED IN PETITIONERS' BRIEF HAS BECOME MOOT.

In petitioners' brief under the title *"Questions Presented,"* the principal question set forth is as follows:

> "1. Is Wisconsin's so-called 'Peace Act,' particularly Section 111.06 (2) (e), prohibiting employees in a bargaining unit from peaceful picketing or boycotting in connection with a strike, unless a majority in such unit have authorized the

strike, void as contrary to the Fourteenth Amendment, depriving petitioners of the right to free speech and denying the equal protection of the laws?"

We contend that this is no longer an issue in the case. It has become a moot question. On May 16, 1940 only three of respondent's employes were members of the union (R. 45). On December 16, 1940, at the time of the entry of the judgment, there were not in excess of eight of the respondent's employes who were members of the union (R. 54). At the time of the trial the respondent had a total of twenty-eight employes who were eligible for membership in Local 344 (R. 45). Subsequent to the entry of judgment in this case the union (Local 344) received into its membership more than a majority of respondent's employes.

On the first day of April, 1941, a written contract was entered into between the respondent and Local 344 wherein the respondent expressly recognized Local 344 "as the sole collective bargaining agent for all truck drivers in its employ during the term of the contract". The contract also provided that it "shall remain in full force and effect to November 1, 1941". A copy of this contract is included in the affidavit set forth in Appendix A annexed to this brief.

On November 5, 1941, John E. Johnson, Regional Director for National Labor Relations Board, forwarded a letter to the respondent making inquiry concerning the relationship between the respondent and Local 344, and on November 11th a letter was forwarded on behalf of respondent to John E. Johnson, Regional Director, National Labor Relations Board, in response to said inquiry, which letter among other statements contained the following:

"Since the signing of the contract the Carpenter Baking Company has at all times recognized and still recognizes Bakery Sales Drivers Local No. 344 (A. F. of L.) as the sole collective bargaining agent for truck drivers in the employ of the Company. The Company stands ready and willing to negotiate with this Union at all times and upon all subjects that are a proper matter for negotiation."

In response to the foregoing letter John E. Johnson, Regional Director, National Labor Relations Board, on December 9, 1941, addressed a letter to the attorneys for respondent reading as follows:

"Gentlemen:

This is to advise you that the question of representation raised by the petition in the above matter has been adjusted.

Very truly yours,

(signed) JOHN E. JOHNSON,
Regional Director."

(Material portions of the foregoing letters are set forth in the affidavit annexed to this brief as Appendix A.)

QUESTIONS PRESENTED THAT ARE NOT MOOT.

Are the following statutory provisions constitutional?

"*111.04 Rights of employes.* Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other

mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

"*111.06 What are unfair labor practices?* (1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04.

* * * * * *

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

* * * * * *

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

STATEMENT OF THE CASE.

Stated in chronological order, the pertinent facts as shown by the record are as follows:

1. In December, 1938, Local 344 demanded that the respondent, Carpenter Baking Company, sign a closed shop agreement (R. 36, 37). At the time this demand was made not a single employe of the Carpenter Baking Company belonged to either Local 344 or Joint Council No. 50 (R. 38). The contract which Local 344 demanded from the respondent required the respondent to discharge any of its employes who refused to join the union (R. 37). The respondent informed the petitioners that it had concluded it could not properly force its employes to join the union and for that reason it was impossible for it to sign the contract (R. 37). Thereupon Local 344 informed the respondent that the union "would be compelled to *exert economic pressure against the company*" in order to secure union membership of the employes.

2. On January 13, 1939, at the request of Local 344, a meeting was held of the respondent's employes, and representatives of Local 344 addressed the meeting. After such addresses by the union representatives the employes voted unanimously against affiliating with the union (R. 40).

3. On the morning of January 16, 1939, Local 344 placed pickets about the respondent's plant. The pickets carried signs stating that the Carpenter Baking Company was "unfair to organized labor" (R. 40).

4. On January 18, 1939, a meeting of all of respondent's bakery sales drivers was held at the offices of the State Labor Board in Milwaukee and all such employes again voted unanimously against affiliating with Local 344.

5. On or about January 23, 1939, the Carpenter Baking Company plant was closed and remained closed until after the passage of the so-called Catlin Act. The plant reopened on April 4, 1939 (R. 41).

6. During the month of June, 1939, Auto Truck Drivers Joint Council No. 50 (A. F. of L.) preferred charges against the Carpenter Baking Company before the National Labor Relations Board.

7. On June 8, 1939, George J. Ritchey, treasurer and business manager of Joint Council No. 50, forwarded a letter to all of the Carpenter Baking Company employes in which he informed them that until June 12, 1939 they could join the union by paying an initiation fee of $7.50 per person, but that after that date the fee would be $100.00 per person (R. 55).

8. On April 29, 1940, petitioner Johnson, who is the business manager for Local 344, telephoned Mr. T. E. McCully, vice-president of the respondent company, and requested a conference with him. The conference was held at the Schroeder Hotel on April 30, 1940 (R. 44). At the conference Mr. Johnson made the following statement to Mr. McCully:

> "I am going to hold a meeting of your men probably at the Maryland Hotel and give them another chance to join up and if they don't, I am going to start and picket your bakery and also have men follow your salesmen and have them picket the stores that they serve. * * * We will put a campaign against you the same as we are against Golden Guernsey." (See Exhibit "F" in trial court, R. 81-84)

9. Prior to May 16, 1940, petitioner Johnson forwarded a letter to all of the respondent company's bakery sales

drivers and requested them to attend a meeting at the Maryland Hotel. The meeting was held on May 16, 1940 in accordance with the written notice and Mr. Johnson addressed the meeting, explaining the benefits of union membership.

10. On July 2, 1940, a similar meeting was held pursuant to written notice which was forwarded to all of the Carpenter Baking Company's sales drivers. The written notice stated:

> "This will be the final meeting for the organization of the Carpenter Baking Company drivers."

11. On August 12, 1940, the petitioners began the picketing activities described in respondent's complaint (R. 71).

On the trial petitioner Elmer Johnson, business manager of Local 344, testified as follows:

> "The activities that were commenced on August 12th were to reduce the sales of those sales drivers. We knew this would result in economic loss to the drivers, and felt that it would be an incentive to the drivers to join the union." (R. 71)
>
> "We wanted to reduce their sales to cut down their earnings." (R. 71)
>
> "I myself followed quite a few of the trucks." (R. 72)
>
> "I am personally acquainted with all the truck drivers of the Carpenter Baking Company." (R. 72)
>
> "I know 80 per cent of them by their first names. I know Mr. Hoff. I have followed Mr. Hoff on his route since August 12, 1940." (R. 72)

Petitioner McMicken, one of the pickets, testified upon the trial as follows:

"Q. You were trying to cut his (bakery sales driver's) pay check down?

A. Naturally.

Q. You thought by doing that you could force him to join the Union?

A. Not force him; make him see the light.

Q. You thought if you could hit a man's pocketbook, that would bring a light to him, is that right?

A. Sure." (R. 57)

"Q. They (the bakery sales drivers) would scoot down alleys and so on, trying to get away from you?

A. Yes." (R. 58)

"Q. While you were engaged in this activity, did any Carpenter sales driver jump a light or go through a red light?

A. I wouldn't say 'jump.' He went through seventy-five miles an hour or better." (R. 61)

"Q. Mr. Paulsen asked you whether some of the men, Carpenter sales drivers, didn't park their car so as to create a traffic hazard, and I believe you testified they did.

A. Right." (R. 61)

"Q. Did I understand you to say they went through at seventy-five miles an hour?

A. Yes.

Q. On how many occasions did you see them go through at seventy-five miles an hour?

A. I had three occasions of that. I remember that very distinctly because I remarked to the man with me. 'That guy is crazy to do that'." (R. 62)

Hudson Alofs, a student at the Milwaukee State Teachers College, testified that he was a rider who accompanied one of the sales drivers during the picketing activities. He

testified concerning the hazardous traffic conditions while being followed by the union automobile, as follows:

> "We eluded the pickets' car by a number of methods. On one day our driver drove parallel with a street car along the street until near a corner, where there was a parked car. The last minute the truck sprang through the street car and the parked car and the picket car could not come through behind. On other days we eluded them by going back to the bakery, and sometimes taking another truck and going out another entrance. Occasionally we left them in traffic where the driver of the car following got to traffic signs and was left behind. We frequently made some stops if we could on alleys and side street stops so as not to have our truck on an important street. We didn't want so many people to see us if the pickets were following.
>
> The effect of the cars following the truck made the truck driver nervous. It is a nerve-wracking job when you have one eye looking through a rear-view mirror to see who is following you and see how close he is, and see if you can stop safely, and if you are worrying about losing stops, particularly when you are in a union neighborhood. These men work very hard." (R. 79, 80)

T. E. McCully, an employe of the respondent company, testified:

> "The union activities since August 12, 1940, have made it more difficult to market our products. A salesman should have a regular time to get to each stop. Due to the fact that he is trying to elude the pickets, he goes different ways. I have observed that

the activities make the men more nervous. I have observed that it has been more difficult for them to take care of their trade." (R. 81)

It is undisputed that from the 12th of August, 1940, until the opening of the trial on September 23, 1940, the respondent company sustained substantial losses due to the petitioners' picketing activities. During that period of time it is estimated that the loss of the respondent company exceeded "15% of its total volume of business" and that due to the activities many customers ceased to patronize the respondent (R. 48).

None of the respondent's employes have quit work or indulged in picketing activities. The wages and labor conditions of such employes have been better than in other plants (R. 52).

ARGUMENT.

I.

The law of Wisconsin relating to employer-employe relations as it existed prior to the 1939 legislative enactments.

Prior to 1939 the legislature enacted laws guaranteeing to employes the right to join labor unions and designate collective bargaining agents of their own choosing. The dominant purpose of these laws was to protect employes from the domination of their employers.

It finally became evident that the shield which the legislature had given the laboring man of Wisconsin as a means of protecting him in his encounters with his employer was being used as a weapon against him by labor unions and

professional labor organizers. The laboring man of Wisconsin soon discovered that the very act that freed him from the coercion and intimidation of his employer subjected him to the coercion and intimidation of a multitude of other designing persons. He came to the sad realization that "tyranny is the same, be it the tyranny of the monarch or the tyranny of the multitude, nay the tyranny of the latter is the greater because it is tyranny multiplied". He learned that his new-born freedom was like a mirage. He was told by zealous professional labor organizers that he must "join the union"; that every month he must pay the union as a means of keeping his job. If he refused to comply with the demand and informed the professional organizer that he was entirely satisfied with his employment conditions and that his employer was a man of unusually high character and ideals and had always paid him high wages and had been kind and considerate of his welfare, and that all of his co-employes were opposed to joining the union, he was threatened with the loss of his job and consequent inability to earn a livelihood for himself and his family. In the event he insisted upon his right to refrain from joining the union, the professional organizer called upon his employer and demanded that the employer sign an all-union contract—and this notwithstanding every employe was opposed to union membership. This type of contract required the employer to discharge any employe who refused to join. If the employer signed the contract the employe was forced to join or lose his job. If the employer objected to coercing his employes and refused to sign the contract, it invited destruction. The law gave the union the right to picket the employer and to proclaim to the world that the employer was "Unfair to Organized Labor".

American Furniture Co. vs. I. B. of T. C. & H. of A., 222 Wis. 338, 268 N. W. 250;
Senn vs. Tile Layers Protective Union, 301 U. S. 468, 81 L. ed. 1269;
Lauf vs. E. G. Shinner & Co., 303 U. S. 323, 82 L. ed. 872.

It became evident to the laboring man of Wisconsin that the law that freed him from the domination and control of his employer automatically subjected him to the domination and control of the union and its professional organizers. The law made it possible for a new oppressor to shackle him. It guaranteed to him the right to join the union. His right to refrain from joining the union was a mere mockery. His freedom of choice was gone. The tyranny of the multitude was upon him. He must submit or lose his daily bread. Moreover, his troubles were not at an end if he did submit. The law made it possible for a rival union to make demands upon him and his fellow-employes.

In the light of the law as it existed when the 1939 legislature convened, it is not surprising that the legislators were confronted by an aroused citizenry demanding that the right of an employe to voluntarily refrain from joining a union should be protected in the same manner as his right to join. Employers and employes alike urged the enactment of laws to secure this protection.

II.

The public policy of the State of Wisconsin is proclaimed by the "Employment Peace Act."

The Employment Peace Act (Chapter 57, Laws of 1939) clearly recognizes that there are three major interests in-

volved in every labor dispute, namely, the interest of the public, the interest of the employe, and the interest of the employer. It further recognizes that whatever the rights of the disputants with respect to each other in the controversy, they should not be permitted in the conduct of their controversy to intrude directly into the primary rights of third parties to earn a livelihood. The declaration of policy as set forth in the Employment Peace Act is contained in section 111.01. Among other provisions it contains the following:

"*111.01 Declaration of Policy.* The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer co-operatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also

recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

* * * * * *

(4) * * * While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

III.

The 1939 legislative enactments guarantee to an employe:

1 — The right to join or refrain from joining a labor organization.

2 — The right to be free from the coercion or intimidation of fellow-employes or outside union members in respect to exercising his right to join or his right to refrain from joining a labor organization.

3 — The right to be free from the coercion or intimidation of his employer in respect to exercising his right to join or his right to refrain from joining a labor organization.

Section 111.04 W. S. 1939 became a part of the law of the State of Wisconsin through the enactment of the Employment Peace Act (Chapter 57, Laws of 1939). That statute provides as follows:

"*111.04 Rights of Employes.* Employes shall have the right of self-organization and the right to

form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

The legislature realized that the rights of a laboring man to join or refrain from joining a labor organization needed to be safeguarded and protected. As a means of safeguarding and protecting this right the legislature expressly prohibited fellow-employes or outside members of labor unions from coercing or intimidating an employe to force him to join a labor union. The fellow-employes are prohibited from exercising such coercion or intimidation by subsection (2) (a) of section 111.06, and members of labor unions are prohibited from indulging in such coercion or intimidation by subsection (3) of section 111.06. Subsection (2) (a) of section 111.06 reads as follows:

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, * * *"

Subsection (3) of section 111.06 provides:

"(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

Subsection (1) (a) of section 111.06 expressly prohibits an employer from interfering with, restraining, or coercing his employes in the exercise of their right to join or refrain from joining a labor organization. That statute reads as follows:

> "*111.06 What are unfair labor practices.* (1) It shall be an unfair labor practice for an employer individually or in concert with others:
>
> (a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04."

It is apparent that at the time of the 1939 legislative enactments the legislature was well aware that professional labor organizers, upon failing to induce workingmen to join the unions voluntarily, had a practice of coercing and intimidating employers so that the employers would in turn force their employes to join the labor organization sponsored by the organizer.

The legislature was not content to merely protect the employe in the enjoyment of the rights guaranteed by section 111.04 from frontal attacks by fellow-employes, unions and employers. It concluded that the employe also needed protection from a flank or rear attack. It accordingly enacted subsection (2) (b) of section 111.06. That statute provides as follows:

> "(2) It shall be an unfair labor practice for an employe individually or in concert with others:
>
> • • • • • •
>
> (b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any prac-

tice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative."

The petitioners contend that these statutes are unconstitutional. Is it beyond the power of the legislature to confer upon a workingman the right to refrain from affiliating with a labor union if he so chooses? If the enactment of such a statute is a proper exercise of legislative power, are we to assume that it is wrongful for the legislature to enact other statutes (similar to section 111.06) to safeguard and protect the employe in the enjoyment of the rights thus conferred upon him?

IV.

Concerted action of employes is unlawful if either the object or the means of the concerted action is improper.

The trial court found that the petitioners engaged in concerted action against the respondent company and intentionally inflicted damage upon the respondent for the purpose of coercing the respondent in order to compel it to force its employes to join the petitioners' union. The petitioners were attempting to force the respondent to commit an illegal act. They wanted the respondent to interfere with the right of its employes to refrain from joining a labor organization.

If the concerted action is carried on to accomplish an unlawful purpose it is quite immaterial that the means used consist of acts that are ordinarily regarded as lawful.

In *Duplex Printing Press Co. vs. Deering,* 254 U. S. 443, 65 L. ed. 349, the court declared:

> "The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone vs. United States,* 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful, it may not be carried out by criminal or unlawful means." (p. 356)

In *Truax vs. Corrigan,* 257 U. S. 312, 66 L. ed. 254, it is stated:

> "Plaintiffs' business is a property right (Duplex Printing Press Co. vs. Deering, 254 U. S. 443, 465, 65 L. ed. 349, 356, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172), and free access for employees, owner and customers, to his place of business, is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful." (p. 260)

The Supreme Court of the State of Wisconsin in *Martens vs. Reilly,* 109 Wis. 464, 84 N. W. 840, declared:

> "It is a combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means. The word 'unlawful' is not confined to criminal acts. It includes all wilful, actionable violations of civil rights. In any case the object of the combination is what gives it legal significance." (p. 473)

It is well settled that acts when performed by a single individual may be lawful, but if they are performed by a group of individuals pursuant to a concerted plan, they may be unlawful. There is an excellent statement of the law on this subject in *Restatement of the Law of Torts,* Vol. 4, pages 94 and 95, as follows:

> "Concerted action by workers merely in making requests of employers, without threat of pressure to secure concession, causes no harm and is not actionable; but concerted action to enforce the requests necessarily involves pressure on the employer which may cause him financial loss or at least interfere with his freedom to operate his business as he likes. Such concerted action, then, necessarily involves the infliction of intentional harm. This was regarded as subjecting the workers to liability unless their conduct was justified; and this theory has prevailed. The development of the law in succeeding years has related to the issue of justification. Some objectives of concerted action and some methods of attaining those objectives which were at one time regarded as unjustified are now regarded as privileged.
>
> * * * * * *
>
> "Particularly in the case of labor combinations, the legal history has been that mere concert may make illegal or at least require justification for conduct in which individuals are free to engage without the requirement of justification when acting independently. Thus, even after an individual worker could withhold his services or custom from any person for any reason, a combination of workers under the same circumstances still required justification. Partly this was due to the fact that individual con-

duct in this sphere was not a problem, whereas concerted action was. Partly it was due to the obvious differences in power between action by individuals and action by combinations of individuals."

The fundamental rule relating to the right of a member of a labor union to indulge in concerted activities has been stated with simplicity and clarity by the American Law Institute in Vol. 4 of the *Restatement of the Law of Torts* as follows:

"Sec. 775. *Liability for concerted action by workers—general principle.*

Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper."

"Sec. 794. *Object prohibited by law.*

An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers.

* * * The expression of public policy is not confined to legislation and criminal law; in passing upon the propriety of an object, public policy otherwised defined is an important factor. If the object is an act against which the law has definitely set its face, it is not a proper object of concerted action."

"Sec. 796. *Combination of objects.*

When workers engage in concerted action against an employer for more than one object and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects."

Briefly stated, opposing counsel's legal contentions may be set forth as follows: A labor union may indulge in peaceful picketing for the purpose of compelling an employer to violate the law. It is our contention that if it is admitted that the object or purpose of the picketing is unlawful, such picketing is also unlawful notwithstanding that it may be carried on in a peaceful manner. The *Restatement of the Law of Torts* (Sec. 796) recognizes that a labor union may have more than one objective—it may have an immediate objective and it may also have an ultimate objective. If the immediate objective is unlawful, peaceful picketing carried on to achieve that objective also becomes unlawful. The purpose of the picketing determines whether it is lawful or unlawful. This is in accord with the decision of this court in *Senn vs. Tile Layers Protective Union,* 301 U. S. 468, 81 L. ed. 1269. In that case Justice Brandeis, writing the majority opinion of the court, expressly recognized that both the means employed and the ends sought must be lawful. Speaking for the court, he declared:

"The judgment of the highest court of the state establishes that both the means employed and the end sought by the unions are legal under its law. The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution.

* * * * * *

"The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act."

* * * * * *

"It follows, that if the end sought is constitutional—if the unions may constitutionally induce Senn to agree to refrain from exercising the right to work in his business with his own hands, their acts were lawful."

Justice Butler wrote the dissenting opinion of the court in that case. The only difference between the dissenting opinion and the majority opinion relates to the question as to whether the object sought by the union was a lawful one. It was recognized in both the majority and dissenting opinions that the object of the picketing must be a lawful one. Justice Butler declared:

"But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned.

* * * * * *

"The object that defendants seek to attain is an unlawful one."

The Supreme Court of the State of Wisconsin recently gave very careful consideration to the statutes under consideration and analyzed them in connection with the review of the recent decisions of this court in *Wisconsin E. R. Board vs. Milk, etc., Union,* 238 Wis. 379, 299 N. W. 31. After commenting upon the decisions of this court in the *Carlson, Thornhill* and *Meadowmoor* cases, the Wisconsin Supreme Court declared:

> "With like reason may it be said that picketing which is unlawful is not justified on the ground that it is a proper exercise of the right of free speech."

In the case at bar the trial court found that the petitioners were attempting to force the respondent employer to violate the law. The employes of the respondent company did not wish to voluntarily join the union and therefore the petitioners sought to bring pressure against the employer so that the employer would in turn force or coerce its employes to become members of the union. The employer could not lawfully accede to such a request. The law of Wisconsin prohibits the employer from coercing its employes or interfering with their free choice of a collective bargaining agent. The petitioners' brief is predicated upon the proposition that because there was no physical violence they were entitled to indulge in picketing activities. They lose sight of the fact that no matter how peaceful picketing may be, if it is carried on for the purpose of coercing other employes or for the purpose of coercing an employer to violate the law, such picketing is unlawful. Very recently this court, in *National Labor Rel. Bd. vs. Virginia Elec. & P. Co.*, ... U. S. ....., 86 L. ed. 306, held that an employer may be guilty of coercion by the mere use of words and without any violence on the part of the employer. If that is true in respect to an employer it must be equally true in respect to an employe. Fortunately in this country we do not have one constitutional guarantee of freedom of speech for an employer and an entirely different one for an employe. In the above case, Justice Murphy writing the opinion of the court, declared:

> "But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain

or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For 'Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure'.

* * * * * *

"The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done. (pp. 310, 311)

* * * * * *

"Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise. Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence." (p. 312)

When the petitioners admit that it is their object to attempt to take from the employes the means of earning a livelihood in an effort to force them to join the union,

they thereby admit that they are indulging in illegal activities. They are also engaging in illegal activities when they apply economic pressure to the employer for the purpose of compelling the employer to persuade its employes to join the union.

The fact that picketing may be peaceful does not imply that it is not coercive. Here the petitioners have frankly admitted that their aim is not merely to advertise the employes; on the contrary it is their aim to make it impossible for the employes to earn a living. To attempt to take a man's livelihood away from him is to attempt to apply economic pressure and thereby coerce him.

The language of this court in *Gompers vs. Buck's Stove & Range Company,* 221 U. S. 418, 55 L. ed. 797, has a special signficance at this time when applied to the legislative enactment under consideration. The court there declared:

> "Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it

is the duty of a government to protect the one against the many, as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't Patronize,' or similar expressions, a force not inhering in the words themselves, and therefore *exceeding any possible right of speech which a single individual might have.* Under such circumstances they became what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction." (Italics supplied)

It is well to bear in mind the activities which section 111.06 (2) prohibits members of labor unions from indulging in are not dependent upon any definition of "labor dispute" as set forth in the statutes. Members of a labor union have no right to coerce an employe whether there is or is not a labor dispute in existence. Likewise, an employer has no right to coerce his employes whether there is or is not a labor dispute in existence. The conduct of the petitioning unions and their members in attempting to "hit the pocketbooks" of the employes is so clearly coercive as to make it difficult to add anything by way of argument.

Would an employer be guilty of coercion if he threatened to reduce the compensation of his employes if they failed to join a labor union? Section 111.04 guarantees to the employe the right to refrain from joining a labor union if he so desires. Obviously, if it would be coercive for an employer to indulge in such a practice, it is equally coercive for a labor union to indulge in similar activities.

The Employment Peace Act is a comprehensive enactment. It is apparent that it was drafted with great care and deliberation. The draftsmen specifically set forth in detail the acts which constitute unfair labor practices. The Act is not composed of sweeping and general declarations.

This court did not have before it such a carefully drawn enactment in any of the cases relied upon by petitioners. The effect of the recent decisions was fully explained by the court in an opinion written by Mr. Justice Frankfurter in *Milk Wagon Drivers Union vs. Meadowmoor Dairies,* 312 U. S. 287, 85 L. ed. 836, as follows:

> "We do not qualify the Thornhill and Carlson decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. Cantwell vs. Connecticut, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A. L. R. 1352; American Federation of Labor vs. Swing, No. 56 this term, this day decided (..... U. S. ....., post, 513, 61 S. Ct. .....). But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, Thornhill vs. Alabama, 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736, supra, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the Thornhill opinion excluded from its scope. 'We are not now concerned with picketing en masse or otherwise conducted which might occasion such

> imminent and aggravated danger * * * as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 U. S. 105, 84 L. Ed. 1104, 60 S. Ct. 736. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

The petitioners' brief in the present case constitutes a distortion of the decision and findings of the learned trial judge. The trial court did not conclude that the Employment Peace Act makes illegal all "peaceful picketing". It merely concluded that "peaceful picketing" carried on pursuant to a preconceived plan for the purpose of compelling an employer to violate the law, constitutes unlawful conduct on the part of a labor union.

The truthfulness of the words printed or uttered is not the test to determine the legality of the acts of the speakers. If the words are printed or uttered pursuant to a preconceived plan entered into by two or more persons for the purpose of accomplishing an illegal object, the fact that the words are true does not constitute a legal justification for their use.

V.

The findings of the trial court are supported by the great weight of the evidence.

In the seventh paragraph of the trial court's findings of fact the court expressly found:

"(1) That the defendants herein have, in concert with others as well as individually, contrary to the provisions of Section 111.06, Wisconsin Statutes, coerced and intimidated the employes of the plaintiff in the enjoyment of their legal rights, including those guaranteed in Section 111.04, Wisconsin Statutes, and have, by such coercion and intimidation, injured said employes in their property by such means.

(2) That the defendants have, individually and in concert with others, by exerting economic pressure upon plaintiff's employes as well as upon customers of the plaintiff solicited by such employes, intended to coerce, intimidate and induce the plaintiff employer to interfere with its employes in the enjoyment of their legal rights, including those guaranteed in Section 111.04, Wisconsin Statutes.

(3) That the defendants have thereby injured the plaintiff in its trade and business for the purpose of compelling the plaintiff to influence and coerce its said employes to designate the defendants Bakery Sales Drivers Local Union No. 344 (A. F. of L.), or Auto Truck Drivers Joint Council No. 50 (A. F. of L.), as a collective bargaining representative for such employes.

(4) That the defendants, by their conduct as individuals, as well as in concert with others in this

regard, have intended to and have in fact injured the plaintiff in its trade and business." (R. 26, 27)

To take the daily bread from the mouths of a workingman and his family as a means of forcing him to join a labor organization is certainly coercive conduct.

The petitioners have admitted that their aim was to make it difficult for the respondent's employes to earn a livelihood. Throughout the history of the common-law the matter of intent has played a significant part in determining whether acts are lawful or unlawful. The difference between murder and justifiable homicide depends upon the intent of the actor. The performance of an act not accompanied or prompted by an evil intent may be entirely innocent and lawful. On the other hand, if the act arises from an evil intent, it may be unlawful. We must examine the qualities of the mind of the actor to determine whether an act is legal or illegal. Peaceful picketing is no different than any other act. If it is carried on in concert to achieve a legitimate purpose it is lawful. On the other hand, if it is used as a means to achieve an illegitimate purpose, it is unlawful.

The history of the controversy between the respondent and the petitioners clearly discloses that from the beginning the petitioners have sought to force the respondent to compel its employes to join the petitioning union. The contract which the petitioners demanded of the respondent in December, 1938, required the respondent to discharge any employe who refused to join the union. Petitioner Johnson, business manager for Local 344, admitted upon the trial that at a meeting with the Carpenter Baking Company executives early in January of 1939, the union attorneys informed the company that the union "had no grievance against the company at all" (R. 70). Only a few days after

this assertion the petitioning unions placed pickets about respondent's plant, carrying signs stating that the respondent was "Unfair to Organized Labor".

At the time the petitioning unions made the demand for a closed shop there was not a single employe of the Carpenter Baking Company who belonged to such unions. The conference between Mr. McCully, vice-president of the Carpenter Baking Company and petitioner Johnson, which was held on April 30, 1940 at the request of Mr. Johnson, clearly proves that the activities of the petitioners were not aimed solely at the employes. Mr. Johnson, business manager for the union, informed Mr. McCully:

> "I am going to start and picket your bakery."

He further stated:

> "We will put a campaign against you." (Exhibit "F" in lower court; R. 81-84.)

Furthermore, the fact that the union followed and picketed the employe Hoff at a time when he was already a member of an affiliate which he joined while in the employ of Carpenter Baking Company also tends to disclose that the union was aiming at the employer. Hoff's application for membership in the affiliate union was taken by Roland Tounier, one of respondent's employes and a member of Local 344 (R. 78). Petitioner Elmer Johnson and other representatives of the union had numerous meetings with the employes of the respondent. The evidence shows that the respondent company cooperated with the petitioning unions in arranging these meetings so that representatives from the unions could address the employes (R. 70). If the employes refused to join the union after having had the alleged benefits of the union personally explained to them, are we to assume that when the union commenced its picketing activities

it was doing so without the intent to injure the respondent and its employes?

The trial court occupied a better position than this court and the Wisconsin Supreme Court to pass upon the truthfulness of the testimony given by the various witnesses on the trial. The trial court had the opportunity to personally see and hear the witnesses. This court has, and the Wisconsin Supreme Court had, nothing but the cold, written record before it.

It has been repeatedly held that the purpose or intent with which acts are performed is to be determined by all of the surrounding facts and circumstances. We submit that there is abundant evidence to sustain the trial court's finding that the petitioning unions were coercing the respondent as well as the respondent's employes.

VI.

The injunction as entered in the trial court is of a limited nature.

It Relates to Acts That Are Wilful and Intentional.

Petitioners claim that the injunction is too broad and sweeping; that if literally carried out it will restrain and enjoin them from activities that are innocent in and of themselves.

As heretofore stated, the court found that the petitioners were carrying on their activities for an illegal purpose. Peaceful picketing, when carried on for a proper purpose, is lawful. Likewise, other activities when carried on for a proper purpose might be lawful. However, when it appears that acts innocent in and of themselves are being performed to achieve an illegal objective, it is entirely proper that such acts be enjoined when an employer against whom they are directed is sustaining an irreparable injury by reason thereof.

The petitioners have set about to destroy the respondent's property. Its property consists of its business. Every day that the petitioners engage in their unlawful activities they are destroying the respondent's property. At the time of the trial it was estimated that respondent had already lost fifteen per cent of its total volume of business. That does not represent its entire loss. The loss is progressive. The destruction of respondent's property has continued every day since the trial. The destruction of this property has been accomplished in part by acts that in and of themselves may seem innocent and harmless. However, when we view the objective of the petitioners, it is quite apparent that they have no lawful right to engage in such activities. The provisions of the judgment are necessarily broad. That is true because the petitioners' objective is an improper one. As already stated, when the objective is improper, an employer is entitled to enjoin acts that might otherwise be innocent and harmless.

It is important to note that the injunction as entered in general prohibits only such activities as are intentionally carried on for the purpose of injuring the respondent or its employes. Throughout the injunction we find that it deals with intentional acts only. For example, paragraph (1) of the injunction is limited to "conduct *intended* and reasonably calculated to coerce and intimidate plaintiff's (respondent) employes" (R. 32). Paragraph (2) prohibits the petitioners from following respondent's delivery trucks while they are being used to deliver bakery products to respondent's customers. The evidence clearly shows that such activities have resulted in serious traffic hazards and certainly the court acted properly in prohibiting conduct which is reasonably calculated to endanger the lives of persons using the public streets. Paragraph (3) of the injunction enjoins the petitioners from "inciting or attempting to

persuade persons not to deal with the plaintiff or the plaintiff's employes or with retail dealers offering plaintiff's products for sale". The trial court found that petitioners were attempting to coerce respondent to violate the law. A part of its plan of coercion was to induce customers not to trade with respondent. When the trial court found that the illegal objective existed certainly it could not properly avoid entering the injunction that it did. Paragraph (4) of the injunction is limited to "intentionally molesting, injuring or interfering with the plaintiff in its busness". If the molesting, injuring or interfering is not intentional it is not prohibited.

VII.

It is immaterial whether the activities of the petitioners were directed against the respondent or against the employes of the respondent.

The petitioners claim that their activities were directed against the employes of the respondent and not against the respondent. We contend the record does not bear out this contention. However, if petitioners' contentions are correct in this regard, it could not properly change the result. The respondent has a legal interest in the services rendered to it by its employes. It has a legal right to have its employes free from coercion in respect to the services they perform.

The "Employment Peace Act" (Sec. 111.01, Wisconsin Statutes) expressly provides:

> "It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights

of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion."

The common law has long recognized that an employer may maintain an action against a wrongdoer in respect to damages sustained by him as the result of an injury to his employe. 35 *Am. Jur.* 958, 39 *C. J.* 1369.

To permit the union to coerce respondent's employes in violation of law is to permit them to intrude "into the primary rights" of the respondent, contrary to the statute.

CONCLUSION.

At the time judgment was entered in this case in the trial court, Local No. 344 was not the "sole collective bargaining agent" for respondent's employes. Since the judgment has been entered it has become and now is "the sole collective bargaining agent" for all of respondent's employes. The respondent has recognized it as such by entering into a formal written contract with the union wherein it is expressly stated that the employer recognized Local No. 344 as "the sole collective bargaining agent," and it still recognizes it as such sole collective bargaining agent. If a legitimate labor dispute hereafter arises between Local No. 344 and the respondent, Local No. 344 has it within its power to engage in picketing or to call a strike. The principal issue presented for determination in petitioners' brief is now a moot question. The writ should be denied.

Respectfully submitted,

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